

ARTICLE 89-10

ISLANDS AND BEDS OF NAVIGABLE STREAMS AND WATERS

Chapter

89-10-01 Islands and Beds of Navigable Streams and Waters

CHAPTER 89-10-01

ISLANDS AND BEDS OF NAVIGABLE STREAMS AND WATERS

Section

89-10-01-01	Authority
89-10-01-02	Prohibition on Permanent Relinquishment
89-10-01-03	Definitions
89-10-01-04	Authorization
89-10-01-05	Application for Permit, Easement, Lease, or Management Agreement
89-10-01-06	Application Review
89-10-01-07	Public Meeting
89-10-01-08	General Permit Standards
89-10-01-09	Specific Project Requirements
89-10-01-10	Projects Not Requiring a Permit
89-10-01-11	Structures Below Ordinary High Watermark
89-10-01-12	Public Recreational Use
89-10-01-13	Vehicular Access
89-10-01-14	Cancellation by the State Engineer
89-10-01-15	Termination by Applicant
89-10-01-16	Assignments
89-10-01-17	Inspections
89-10-01-18	Reclamation
89-10-01-19	Maintenance and Repair
89-10-01-20	Areas of Special Interest

89-10-01-01. Authority. These rules are adopted and promulgated by the state engineer pursuant to North Dakota Century Code chapter 61-33 to provide consistency in the administration and management of the islands and beds of navigable streams and waters. These rules do not apply to the interests of the state of North Dakota in oil, gas, and related hydrocarbons.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-02. Prohibition on permanent relinquishment. Sovereign lands may not be permanently relinquished but must be held in perpetual trust for the benefit of the citizens of the state of North Dakota.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-03. Definitions. The following definitions apply to this article:

1. "Authorization" means a permit, easement, lease, or management agreement approved and granted by the state engineer after application; and the authority granted in sections 89-10-01-10 and 89-10-01-19.
2. "Grantee" means the person, including that person's assigns, successors, and agents who are authorized pursuant to an authorization.
3. "Navigable streams or waters" means any waters which were in fact navigable at time of statehood, including the Missouri River in its entirety, the Yellowstone River in its entirety, the Red River of the north from Wahpeton to the Canadian border, the Bois De Sioux River from Wahpeton to the South Dakota border, the James River, the Upper Des Lacs Lake, and Devils Lake.
4. "Ordinary high watermark" means that line below which the action of the water is frequent enough either to prevent the growth of vegetation or to restrict its growth to predominantly wetland species. Islands in navigable streams and waters are considered to be below the ordinary high watermark in their entirety.
5. "Project" means any activity which occurs below the ordinary high watermark of navigable streams or waters.
6. "Riparian owner" means a person who owns land adjacent to navigable streams or waters or the person's authorized agent.
7. "State engineer" means the state officer provided for in North Dakota Century Code section 61-03-01 or any of the state engineer's employees or authorized agents.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-04. Authorization. Each project which lies either partially or wholly below the ordinary high watermark of navigable streams or waters requires

an authorization from the state engineer prior to construction or operation, except as specified in sections 89-10-01-10 and 89-10-01-19.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-05. Application for permit, easement, lease, or management agreement. Applications for an authorization must be on forms prescribed by the state engineer and contain the information required by the state engineer. Applications must be submitted to the North Dakota State Engineer, State Office Building, 900 East Boulevard, Bismarck, North Dakota 58505.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-06. Application review. Upon receipt of a completed application, the state engineer shall initiate a review as follows:

1. Comments must be requested from the following entities:
 - a. The state game and fish department;
 - b. The state department of health and consolidated laboratories;
 - c. The state historical society;
 - d. The state land department;
 - e. The state parks and recreation department;
 - f. The United States fish and wildlife service;
 - g. The park district and planning commission of any city or county, if any part of the project is within the boundaries of the city or county;
 - h. Any water resource district in which the proposed project will be wholly or partially located; and
 - i. Other agencies, private entities, and landowner associations as appropriate or required by law.
2. Each entity shall submit all comments in writing to the state engineer within thirty days of the date requests for comments were mailed. The state engineer is not bound by any comment submitted.

3. Upon completion of the review and any public meeting held pursuant to section 89-10-01-07, the state engineer may grant, deny, or condition the application.
4. The state engineer shall provide written notice of the decision on the application by certified mail or by regular mail provided the state engineer files an affidavit of service by mail indicating upon whom the decision was served.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-07. Public meeting. An information-gathering public meeting may be held by the state engineer prior to final action on a project. The procedure for notice and meeting must be as follows:

1. The state engineer shall cause a notice of meeting to be published in the official newspaper for each county in which the project is located. The notice must be published once each week for two consecutive weeks.
2. The meeting date must be at least twenty days after the date of last publication.
3. The meeting must be conducted by the state engineer and the meeting may be held in Bismarck.
4. The meeting is not an adversary proceeding nor a contested case hearing under North Dakota Century Code chapter 28-32.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-08. General permit standards. The state engineer may approve, modify, or deny any permit application. In deciding what action to take on a permit application, the state engineer shall consider the potential effects of the proposed project on the following:

1. Riparian owner's rights;
2. Recreation;
3. Navigation;
4. Aesthetics;
5. Environment;

6. Erosion;
7. Maintenance of existing water flows;
8. Fish and wildlife;
9. Water quality; and
10. Alternative uses.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-09. Specific project requirements.

1. In addition to the considerations set forth in section 89-10-01-08, the following conditions apply when a permit application involves the mining of gravel, sand, or other resources other than oil, gas, and related hydrocarbons:
 - a. Mining must be completed in the shortest practicable period of time and during the season which will minimize the effects on the waterway and biotic life in the waterway.
 - b. Mining may be prohibited or restricted when it would, in the judgment of the state engineer, adversely affect the maintenance or reproduction of fish or other wildlife populations.
 - c. If the state engineer determines mining will have a significant adverse impact on downstream riparian owners, the grantee must obtain the riparian owner's written consent.
2. In addition to the considerations set forth in section 89-10-01-08, the following considerations apply when a permit application involves dredging or filling:
 - a. Unless there is no reasonable alternative or the public need exceeds other values, dredging or filling will not be permitted.
 - b. Dredged material must be removed to a site above the ordinary high watermark unless otherwise authorized by the state engineer.

- c. Approved fill must be clean, nonpolluting material free of waste metal, organic material, and unsightly debris.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-10. Projects not requiring a permit. The following projects do not require a permit:

1. Boat docks if:
 - a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for the riparian owner's or lessee's personal use;
 - b. The dock is used only for embarkation, debarkation, moorage of boats, or recreation;
 - c. Only clean, nonpolluting materials are used;
 - d. The dock does not extend more than twenty-five feet [7.6 meters] in length within the ordinary high watermarks on a river and fifty feet [15.24 meters] in length within the ordinary high watermarks on a lake, and there is no unreasonable interference with navigation or access to adjacent riparian owner's property;
 - e. The dock is connected to shore by a walkway, and removed from below the ordinary high watermark each fall;
 - f. There is no excavation or filling below the ordinary high watermark in excess of that authorized in subsection 4; and
 - g. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.
2. Boat ramps if:
 - a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for the riparian owner's or lessee's personal use;
 - b. Excavation of the bank is limited to the minimum width necessary for the placement of a single lane boat ramp adjacent to privately owned property or a double lane boat ramp adjacent to publicly owned property;

- c. Material excavated from the bank is removed to a location above the ordinary high watermark;
 - d. Only such clean, nonpolluting fill and riprap material free of waste metal, organic materials, and unsightly debris are placed below the ordinary high watermark as necessary to construct and stabilize the boat ramp; and
 - e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.
3. Water intakes if:
- a. They are constructed, operated, and maintained by the riparian owner or the riparian owner's lessee for riparian owner's or lessee's personal use;
 - b. Excavation of the bank is limited to the minimum width necessary to install and maintain the water intake;
 - c. Materials excavated from the bank are removed to a location above the ordinary high watermark;
 - d. The intake is entirely removed each fall; and
 - e. Upon abandonment, the grantee restores the bank as closely as practicable to its original condition.
4. Dredging or filling if:
- a. The work is completed and maintained by the riparian owner or the riparian owner's lessee;
 - b. The amount of dredge or fill material does not exceed ten cubic yards as part of a single and complete project;
 - c. No stream diversion results;
 - d. No extension of a claim of ownership to an island or any portion of the bed of a navigable stream or water results; and
 - e. Only clean, nonpolluting material free of waste metal, organic materials, and unsightly debris is used.

5. Boards that are temporarily moored.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-11. Structures below ordinary high watermark. Excluding boats that are temporarily moored, the construction or moorage of any residential structure or structure designed for human occupancy will not be permitted below the ordinary high watermark.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-12. Public recreational use. The public's right to use the islands and beds of navigable streams and waters for nondestructive, recreational purposes is not prohibited except as otherwise provided by these rules.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-13. Vehicular access. The use of motorized vehicles other than boats below the ordinary high watermark is authorized in conjunction with the use of navigable waters for transportation or recreation, or as reasonably necessary for activities allowed pursuant to these rules. This section does not authorize use of property above the ordinary high watermark but does authorize the use of trails established by a government agency, such as those established for snowmobiles, which are located below the ordinary high watermark.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-14. Cancellation by the state engineer. The state engineer may cancel any authorization granted pursuant to these rules, including projects authorized by sections 89-10-01-10 and 89-10-01-19, if the grantee fails to comply with any term or condition of the authorization or this article. Cancellation does not release grantee from any liability.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-15. Termination by applicant. The grantee may terminate or surrender any authorization by notifying the state engineer in writing, paying all

fees or royalties or other money owed to the state, and reclaiming the site pursuant to section 89-10-01-18.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-16. Assignments. Any authorization granted pursuant to these regulations may only be assigned with the written consent of the state engineer.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-17. Inspections. The state engineer may inspect all projects which lie below the ordinary high watermark and enter upon a grantee's land during normal working hours to carry out the inspection.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-18. Reclamation. After cancellation, termination, abandonment, or expiration of an authorization, grantee must reclaim the project location. The time allowed for reclamation shall be one hundred twenty days, unless the permit is for mining which shall be reclaimed within sixty days after the lease expires or the mining is complete. The state engineer may extend the time period if good cause is shown. If grantee fails to reclaim the site to the specifications in the authorization within the required timeframe, the state engineer may enter and restore the project location. The grantee is liable for all reclamation costs.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-19. Maintenance and repair. Maintenance or repair of authorized projects do not require additional authorization provided the work is in conformance with the original authorization, standards, and specifications provided in this article, and the work does not alter the use or size of the project.

History: Effective November 1, 1989; amended effective August 1, 1994.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33

89-10-01-20. Areas of special interest. The state engineer may enter agreements for management of areas of high public value. Examples include, but

are not limited to, parks, beaches, public access points, nondevelopment areas, and wildlife management areas.

History: Effective November 1, 1989.

General Authority: NDCC 28-32-02, 61-03-13

Law Implemented: NDCC 61-33